

IN THE SUPREME COURT OF MISSOURI

NO. SC86741

**FURLONG COMPANIES, INC,
RESPONDENT,**

vs.

**CITY OF KANSAS CITY, MISSOURI,
APPELLANT.**

**CASE NO. 00CV210725
WD63248**

**APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
DIVISION NO. 4
HONORABLE JUSTINE E. DEL MURO, CIRCUIT JUDGE**

APPELLANT'S SUBSTITUTE REPLY BRIEF

**GALEN BEAUFORT, #26498
CITY ATTORNEY**

Douglas McMillan, #48333
Assistant City Attorney
2800 City Hall
414 East 12th Street
Kansas City, Missouri 64106
(816) 513-3107, Fax (816) 513-3105

**ATTORNEYS FOR APPELLANT
CITY OF KANSAS CITY,
MISSOURI**

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II. POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE IT EXCEEDED ITS PERMISSIBLE SCOPE OF REVIEW BY HEARING THE PROCEEDING DE NOVO IN THAT REVIEW OF A PLAT APPLICATION DENIAL IS LIMITED TO THE INFORMATION PRESENTED TO THE CITY COUNCIL.**
- II. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT THE CITY COUNCIL'S DECISION WAS ARBITRARY OR CAPRICIOUS IN THAT THE INFORMATION THE CITY COUNCIL REVIEWED WAS SUFFICIENT TO SUPPORT THE CITY COUNCIL'S DECISION TO DENY THE PRELIMINARY PLAT APPLICATION.**
- III. THE TRIAL COURT'S GRANT OF JUDGMENT ON THE SUBSTANTIVE DUE PROCESS CLAIM WAS CLEARLY ERRONEOUS BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CITY ACTED IN A CLEARLY IRRATIONAL MANNER WHEN ITS CITY COUNCIL DENIED FURLONG'S PRELIMINARY PLAT APPLICATION IN THAT THE TRIAL COURT ERRONEOUSLY DECLARED THE LAW AND IN THAT THE PLAT DID NOT COMPLY WITH THE CITY'S SUBDIVISION ORDINANCE AND THIS WAS A RATIONAL BASIS FOR THE CITY'S DENIAL AND**

**IN THAT FURLONG USED THE PROCESS AVAILABLE
AND THEREFORE WAS NOT DENIED DUE PROCESS.**

- IV. THE TRIAL COURT'S AWARD OF DAMAGES WAS CLEARLY
ERRONEOUS BECAUSE THERE WAS NO SUBSTANTIAL
EVIDENCE TO SUPPORT A FINDING THAT THE CITY
PROXIMATELY CAUSED THE DAMAGES AWARDED TO
FURLONG.**

III. ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE IT EXCEEDED ITS PERMISSIBLE SCOPE OF REVIEW BY HEARING THE PROCEEDING DE NOVO IN THAT REVIEW OF A PLAT APPLICATION DENIAL IS LIMITED TO THE INFORMATION PRESENTED TO THE CITY COUNCIL.

THE TRIAL COURT ERRED BY FINDING THAT THE CITY COUNCIL'S DECISION WAS ARBITRARY AND CAPRICIOUS.

Furlong cited no place in the record where it pled that it was relying on the Missouri Administrative Review Act (MAPA). Any reliance on review under MAPA is simply incorrect. Furlong pled an action in mandamus. Interestingly enough, Furlong at times concedes that the approval of a preliminary plat is a “ministerial act” (Brief p. 41), but then does not want to be limited to application and information that formed the “clear legal right to approval.” Furlong cannot have it both ways.

It is clear under *State ex rel. Westside Dev., Co. Inc. v Weatherby Lake*, 935 S.W.2d 634 (Mo. App. W.D. 1996) the proper mode of review of the denial of a preliminary plat application is via a writ of mandamus and not a trial *de novo* under MAPA.

Furlong fails to acknowledge the City's position that the conducting of an evidentiary hearing was erroneous. The purpose of the writ of mandamus is to execute, not adjudicate. *State ex rel. Missouri Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo. 1999). It is the entire trial court record of testimony and exhibits that went beyond what was presented to the City that is objectionable.

The trial court erroneously applied the law when it conducted a trial *de novo* for the mandamus claim. Therefore, the writ of mandamus issued by the

trial court should be vacated and judgment entered in favor of the City.

II. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT THE CITY COUNCIL'S DECISION WAS ARBITRARY OR CAPRICIOUS IN THAT THE INFORMATION THE CITY COUNCIL REVIEWED WAS SUFFICIENT TO SUPPORT THE CITY COUNCIL'S DECISION TO DENY THE PRELIMINARY PLAT APPLICATION.

By accepting this case, this Court ordered the Court of Appeals to vacate its order and take no further action. This leaves the case in the same procedural posture as though the case was being appealed in the first instance.

There is nothing in Missouri Supreme Court Rule 83.08(6) that prohibits reconfiguring arguments, it just prohibits altering the basis of any claim. The propriety of the entry of the mandamus order and the sufficiency of the evidence to support the City Council's decision were raised in the Appellate Court. (See Appellant's Brief p. 10-19).

Furlong's position that the City never told it why its application was denied is not supported by the record. It is clear that there was neighborhood opposition to increased noise and traffic, and the requested changes in the plat that were not made by Furlong.

Furlong believes that the number of other approved applications indicates that somehow the mere denial of its application is evidence of wrongdoing by the City. There is no evidence to show that the City approved applications when they were not modified to meet staff requested changes.

This Court should find from the record that was before the City that there were sufficient rational reasons to deny Furlong's preliminary plat application.

Therefore, the writ of mandamus issued by the trial court should be vacated and judgment entered in favor of the City.

III. THE TRIAL COURT'S GRANT OF JUDGMENT ON THE SUBSTANTIVE DUE PROCESS CLAIM WAS CLEARLY ERRONEOUS BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CITY ACTED IN A CLEARLY IRRATIONAL MANNER WHEN ITS CITY COUNCIL DENIED FURLONG'S PRELIMINARY PLAT APPLICATION IN THAT THE TRIAL COURT ERRONEOUSLY DECLARED THE LAW AND IN THAT THE PLAT DID NOT COMPLY WITH THE CITY'S SUBDIVISION ORDINANCE AND THIS WAS A RATIONAL BASIS FOR THE CITY'S DENIAL AND IN THAT FURLONG USED THE PROCESS AVAILABLE AND THEREFORE WAS NOT DENIED DUE PROCESS.

THERE IS NO CAUSE OF ACTION FOR MONEY DAMAGES UNDER THE SUBSTANTIVE DUE PROCESS CLAUSE FOR THE DENIAL OF A PRELIMINARY PLAT APPLICATION.

Furlong's substitute brief cites no Missouri case or Eighth Circuit case applying Missouri law that holds that Furlong should receive damages. Furlong instead tries to create a claim where none is recognized.

Furlong argues that *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) and *Frison v. City of Pagendale*, 897 S.W.2d 129 (Mo. App. E.D. 1995) involved questionable constitutional rights and thus do not apply. In *Chesterfield*, a zoning ordinance was passed in violation of state law and to the detriment of property owners. In *Frison*, an applicant who met all qualifications was denied a business license in

retaliation for cooperating in a corruption investigation of the very officials that denied the applicant. In both instances the Court found no substantive due process claims. *Chesterfield* and *Frison* provide great guidance for the outcome of this case.

Furlong cites several Third Circuit cases, *Bello v. Walker*, 840 F.2d 1124 (3rd Cir. 1988), *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592, 601-02 (3d Cir. 1995) and *Woodwind Estates Ltd. v. Grekowski*, 205 F.3d 118, 123 (3rd Cir. 2000) to support its position that a cause of action exists for damages under the facts of this case. These cases are inapposite because, the Third Circuit did not use the truly irrational standard employed by the State of Missouri and the Eighth Circuit. Additionally, “On the merits, we hold that *Lewis* has superceded prior decisions of our Court holding that a plaintiff asserting that a municipal land-use decision violated substantive due process need only show that the municipal officials acted with an “improper motive.” Thus, *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), and its progeny are no longer good law.” *UA Theatre Circuit v. Twp. of Warrington*, 316 F.3d 392, 394 (3d Cir. 2003). As such, Furlong cannot rely on the Third Circuit improper motive cases.

In a Third Circuit case not cited by Furlong, *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1035 (3d Cir. 1987), the court held that irrationality is not shown absent proof that the government took actions against a developer “for reasons unrelated to land use planning.” The court cited to *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981), for the following explanation of when a city might violate substantive due process law by one its enactments: “The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. ‘The law need not be in every respect logically consistent with its aims to be

constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.” 616 F.2d at 689 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955)).

Thus, even in the Third Circuit if the decision was rationally related to “a legitimate state interest” and there was no improper motivation “unrelated to land use planning,” there is no substantive due process violation.

The same applies to Furlong’s citation to the Ninth Circuit case of *Bateson v. Greisse*, 857 F.2d 1300 (9th Cir. 1988) and the Washington state case of *Mission Springs, Inc. v. City of Spokane*, 134 Wash. 2d 947, 954 P.2d 250 (Wash. 1988), as these Courts did not use the truly irrational standard. In virtually all of the non-Eighth Circuit and non-Missouri cases cited by Furlong there was evidence of a wrongful motivation for the governmental action in question.

In the present case, Furlong presented absolutely no evidence of improper motivation unrelated to land use planning. Virtually all of the evidence presented by Furlong was that the City Council denied the plat based on the traffic concerns brought forward by neighborhood opposition. Even if this court finds that the traffic concerns did not support the denial of the plat, and that the circuit court properly issued mandamus, this evidence would not, even under the more liberal former Third Circuit standard of “improper motive”, support a substantive due process claim.

Furlong attempts, in footnote 19, to dismiss *Heritage Development of Minn., Inc. v. Carlson*, 269 F. Supp. 2d 1155 (D. Minn. 2003), cited by Amicus Curiae, as factually distinguishable, but does not state how it is distinguishable. In fact, *Heritage*, is right on point. In that case, the City’s

legitimate justification for denial of a preliminary plat was its concerns about traffic, as in the present case. The court held that even if the City Council's denial was "premised on an incorrect interpretation or application of law, such a mistake does not rise to the level of a constitutional claim." *Id.* at 1161. This case is not distinguishable from the present case.

It is the City's position that the trial court erroneously declared the law because there is no cause of action that allows an applicant to recover money damages based on the initial denial of a preliminary plat application and its later approval.

FURLONG FAILED TO PROVIDE SUBSTANTIAL EVIDENCE TO PROVE A SUBSTANTIVE DUE PROCESS CLAIM.

FURLONG UTILIZED THE PROCESS AVAILABLE TO APPROVE ITS DENIED APPLICATION

Furlong argues that its substantive due process rights were violated when the City denied its application, and that it should recover damages under this theory despite the fact that its application was later approved. In *LaSociete Generale Immobiliere v. Minneapolis Community Dev. Agency*, 44 F.3d 629, 640 (8th Cir.1994), plaintiff claimed that it was deprived of both a property interest and a liberty interest, and further asserted that it was denied both procedural and substantive due process. The Eighth Circuit affirmed the district court's grant of judgment as a matter of law for the City, finding that plaintiff's breach of contract claim provided an adequate post-deprivation state law remedy. The rationale in *LaSociete* applies to this case as Furlong had and used the state law remedy of mandamus.

The trial court erroneously applied the law when it ruled in Furlong's favor on the substantive due process claim. Therefore, the judgment issued by the trial

court should be vacated and judgment entered in favor of the City.

IV. THE TRIAL COURT'S AWARD OF DAMAGES WAS CLEARLY FURLONG.

ERRO

DAMAGES SHOULD NOT HAVE BEEN AWARDED.

Furlong made the choice to proceed along the slow track for a remedy to which it claims it had a clear legal right. Furlong believes it should receive damages for the slow track period from May 4, 2000 (case filed) to November 29, 2000 (mandamus order entered). If Furlong had simply submitted the application and information the City had to the trial court for review, it would not have taken seven months to resolve this matter. There is nothing misleading about the fact that Furlong chose to take depositions and to conduct other discovery. The purpose of the writ of mandamus is to execute, not adjudicate. *State ex rel. Missouri Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo. 1999). The City should not have to pay for Furlong's self-inflicted delay of adjudicating a mandamus claim.

Additionally, Furlong has no answer for why it could not have obtained conditional building permits and proceeded with construction. Furlong has no explanation for why it did know conditional building permits were available.

The trial court erroneously applied the law when it awarded damages on the substantive due process claim. Therefore, the judgment issued by the trial court should be vacated and judgment entered in favor of the City.

REPLY TO RESPONDENT'S POINT ONE.

Furlong claims that the City's facts are argumentative and violate Supreme Court Rule 84.04(c) but cites no specifics. The City made an effort to present a complete non-argumentative statement of facts.

REPLY TO RESPONDENT'S POINT TWO.

Furlong claims that the City did not "properly detail" the record on

appeal. The City's brief contains citations to the record in the fact section. There are no recitation to facts in the argument section that were not already cited in the facts section. There is no basis for dismissal under Supreme Court Rule 84.04(i).

Furlong is looking to a procedural way to avoid addressing the merits of this appeal. Appeals should be decided on the merits if possible. *State v. Westcott*, 121 S.W.3d 543, 545 n.2 (Mo. App. W.D. 2003). Even if there was a minor technical violation of the rules, Appellate courts retain the discretion to decide appeals, notwithstanding failure to comply with the rules of appellate procedure, when it prejudices neither respondent nor the court of appeals' review, *Butterbaugh v. Public Water Supply Dist. No. 12 of Jackson County*, 512 S.W.2d 445, 447 (Mo. App. W.D. 1974). This is true when the issues presented are important. *State v. Miller*, 815 S.W.2d 28, 31 (Mo. App. E.D. 1991). Furlong has not demonstrated any prejudice.¹

¹Furlong failed to file a separate motion under Missouri Supreme Court Rule 84.01 to strike the City's Substitute Brief.

IV. CONCLUSION

For the foregoing reasons, Appellant City of Kansas City, Missouri respectfully requests that this Court reverse and vacate the judgment of the Circuit Court entered in favor of Respondent Furlong Companies, Inc.

Respectfully submitted,

GALEN BEAUFORT, #26498
City Attorney

By: _____
Douglas McMillan, # 48333
Assistant City Attorney
2800 City Hall
414 East 12th Street
Kansas City, Missouri 64106
(816) 513-3107, Fax (816) 513-3105

ATTORNEYS FOR APPELLANT
CITY OF KANSAS CITY, MISSOURI

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